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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1337

ACACIA MUTUAL LIFE INSURANCE COMPANY
and KARL W. CORBY, *Petitioners,*

v.

ALBERT F. JORDAN, Superintendent of Insurance for the District of Columbia, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Karl W. Corby, an individual, and Acacia Mutual Life Insurance Company, a corporation chartered by Congress in 1869, Petitioners, pray that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit, in which judgment was entered on February 20, 1969.

A certified transcript of the record in this case, including the proceedings in the Court of Appeals, is furnished herewith in accordance with Rule 21 of this Court.

REFERENCE TO OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is reported in 283 F. Supp. 766, and is printed in the Appendix hereto (cited herein as App.) at pages 1a to 5a. The opinion of the Court of Appeals is not yet reported, but is printed in the Appendix hereto at pages 6a to 12a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 1969.[1] It is printed in the Appendix hereto at page 13a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The proffered case poses a question stemming from apparently conflicting decisional rules of statutory construction laid down by the courts, namely:

(1) Whether an ambiguous criminal section found in an Insurance Act governing the incorporation and conduct of the business of insurance companies in the District of Columbia, which contains civil, criminal

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[1] It will, of course, be noted that the judgment entered by the Court of Appeals states: *"Reversed and remanded for further proceedings not inconsistent with this opinion."*

Petitioners volunteer an explanation for the remand, since no express reason is to be found in the opinion or judgment. It could be that further proceedings in the District Court would consist of vacating judgment in favor of Petitioners, and entering judgment for Respondent.

Petitioners submit that a petition for certiorari at this time is proper. The alternative, which would be an idle one, would be for Petitioners to appeal from a judgment in favor of Respondent, suffer an identical decision of the Court of Appeals, and then apply to this Court for certiorari. Rule 20 of this Court would prevent an application for certiorari *before* rendition of a new judgment by the Court of Appeals.

and regulatory provisions, should be liberally construed.

More particularly, should an unclear and ambiguous misdemeanor provision in the *Life Insurance Act of the District of Columbia* (Sec. 35-530 of the *District of Columbia Code, as amended,* 1967 Ed.) prohibiting a director or officer of an insurance company from receiving any money for procuring a loan from his company, or being pecuniarily interested in a loan from his company, be liberally construed so as to make criminal his election or appointment as an officer or director of such company if the loan, which he had obtained from the company prior to election or appointment, was still outstanding; or should this provision be strictly construed so as to bar only the making of a loan to, or participation therein by, an officer or director *after* his appointment or election?[2]

STATUTE INVOLVED

"*Sec. 35-530. Officers and directors not to be pecuniarily interested in transactions—Appraisement—Loans on policies.*

No director or officer of any company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending, or aiding in any purchase by or sale to such company of any property, or any loan from such company, nor be pecuniarily interested, either as principal, co-principal, agent, or beneficiary, in any such purchase, sale, or loan, nor

[2] While construction of *local law* is involved, the legal principle is more widespread, and the question has been decided in a way in conflict with applicable decisions of this Court. (Compare Rule 19(b) of this Court.)

shall the financial obligation of any such director or officer be guaranteed by such company in any capacity: *Provided,* That nothing herein contained shall prevent any such director or officer from receiving a fee for appraising property for said company or for serving on any committee that passes on the investments of said company: *Provided further,* That nothing herein contained shall prevent a life insurance company from making a loan upon a policy held therein by a director not in excess of the net value thereof. Any person violating any provision of this section shall be guilty of a misdemeanor. (June 19, 1934, 48 Stat. 1151, ch. 672, Ch. III Sec. 30.)[3]

STATEMENT OF THE CASE

On April 12, 1962, Acacia Mutual Life Insurance Company (Acacia), in the normal course of its business, made a real estate mortgage loan to a group of parties including Petitioner Corby (Tr. 3). The terms of this loan were in accordance with the terms then customarily in effect.[4] This loan is still outstand-

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[3] The catch-all penalty provision is found in Section 35-801, which reads as follows:

§ 35-801. Penalties.

Any persons, partnership, or company who violates any of the provisions of chapters 3-8 of this title, or fails to comply with any duty imposed upon him or it by any provision of chapters 3-8 of this title, for which violation or failure no penalty is elsewhere provided by the laws of the District, shall be fined not exceeding $500 for each and every violation. (June 19, 1934, 48 Stat. 1176, ch. 672, Ch. VI, § 1.)

[4] The loan, originally in the sum of $288,000.00 was made to Karl W. Corby Construction Corporation, Karl W. Corby and Company, Inc. and Karl W. Corby, Edward M. Castle and William B. Asher as individuals. (Tr. 15) It was for 21 years with curtailment at $2,000 per month, including interest at 6%, and was secured by a six-story office building. The unpaid balance as of March 15, 1968 was $240,409.03 (Tr. 30.)

ing, and all payments thereon have been promptly made in accordance with the terms of the loan (Tr. 30).

At the time of the making of this mortage loan, Corby had no connection of any kind with Acacia. Years later, namely, on March 21, 1967, Corby was elected by the policyholders of Acacia to its Board of Directors [5] for a three (3) year term.

The facts and arguments concerning Corby's legal interest in the earlier-made but still outstanding loan were presented to Respondent, Superintendent of Insurance for the District of Columbia, in a letter from Mr. Howard W. Kacy, then President of Acacia, dated June 26, 1967 (Tr. 15). On June 30, 1967, the Respondent replied to Acacia that it would be unlawful for Corby to have a seat on Acacia's Board while there was an outstanding loan with Acacia in which he had a pecuniary interest. Respondent stated:

> "It seems to me that a life insurance company serves its policyholders in a fiduciary capacity, and I simply do not believe that a debtor-creditor relationship should exist between the fiduciary company and those who control it." (Tr. 20).

Acacia attempted to dissuade Respondent from his views, but failed. (Tr. 22). Therefore, Respondent refused to issue unqualified Certificates of Compliance [6] showing that Acacia was complying with the laws of the

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[5] Petitioner Corby's term expires March, 1970, at which time he is eligible for re-election (Tr. 30), unless the decision in question prevails.

[6] There is no local statutory authority for such a certificate. It is sent annually to States where Acacia is doing business. It is not to be confused with a Certificate of Authority, issued by Respondent annually, pursuant to D.C. Code Section 35-404.

District of Columbia; instead Respondent qualified this Certificate as follows:

> "Question 17 of the General Interrogatories section on page 17 of the annual statement of Acacia Mutual Life Insurance Company of 1967 shows information relating to a mortgage loan held by the company.
>
> "I believe that the loan involves a violation of Sec. 35-530 of the D.C. Code. The company disagrees, and has instituted a declaratory judgment action in the United States District Court for the District of Columbia." (Tr. 32).

A certificate so qualified could cause Acacia to lose its right to do business in some or all of the States requiring such a certificate.[7]

This suit by both Acacia and Corby, seeking a declaratory judgment as to the scope of the misdemeanor provision involved, followed. (Rule 57, F.R. Civ. P.) After Respondent answered the complaint, both parties filed motions for summary judgment, it being agreed that there was no genuine issue as to any material fact. (Tr. 28, 30).

The District Court granted summary judgment in favor of Petitioners, holding that the statute, being criminal and being ambiguous, should be strictly construed. The Court of Appeals reversed, holding that the section was more remedial and regulatory than criminal, and should be liberally construed in favor of the Respondent's supervisory status.

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[7] See affidavit of Herbert E. Martin, Jr. at Tr. 32.

REASONS FOR GRANTING THE WRIT

As stated above, the trial court granted summary judgment in favor of Petitioners, rejecting the expanded construction of the misdemeanor provisions urged by Respondent. It held in part:

> "At the outset it must be emphasized that a criminal penalty is attached to the statute and, therefore, it must be treated as a penal statute.
>
> "It is fundamental that penal statutes must be strictly construed. This rule does not mean that the narrowest and strictest possible interpretation must be put on a penal statute that might completely defeat the purpose of Congress and devitalize the provisions. It does mean, however, that while the courts should put a reasonable construction on a penal statute, nevertheless it should not be broadly or liberally construed but should be interpreted in a narrow and strict manner because of the criminal penalty that may be imposed for its violation." (App. 3a)
>
> * * *
>
> "In addition to the requirement of narrow construction of penal statutes we must apply another principle, that ambiguities in a penal statute should be resolved in favor of a person who is affected by it, in view of the basic doctrine that a criminal penalty shall not be imposed on anyone for some violation that is not clearly accentuated in the statute." (App. 5a).

The Court of Appeals reversed, treating the statute as "more regulatory than criminal in nature." The language of the opinion upon this point is as follows:

> "The purpose of Section 530 is more regulatory than criminal in nature. The section appears in our Code under Title 35.—Insurance. It is part

> of a detailed statutory regulation of that business by a Department of Insurance headed by the Superintendent of Insurance, a statutory officer. Section 530 is not part of our Code devoted to the definition and punishment of crime. * * * The dominant purpose is not to punish one who violates the statute, but to secure the fiduciary relationship from being utilized in a manner which might give rise to such a conflict. It is to maintain the company's affairs in conformity with the policy expressed. The addition of the misdemeanor sanction is incidental to this." (App. 9a).

The appellate court admittedly gave the section a liberal construction, stating:

> "* * * Resort to a rule of strict construction to accomplish the more limited scope of the language is inappropriate; for in such a dominantly regulatory statute the rule of strict construction of a criminal statute is relaxed: * * *.[8] (App. 10a)

All of these remarks of the Court of Appeals make it apparent that, in the minds of that Court, an ambiguity exists in the section, which calls for a liberal construction in order to sustain Respondent.

I

SECTION 530 IS ENTIRELY CRIMINAL IN CHARACTER AND SHOULD BE STRICTLY CONSTRUED

The Court of Appeals claimed that Sec. 530 is more regulatory than criminal in nature. It emphasized this assertion by pointing out that Sec. 530 is not part of the Code devoted to the definition and punishment

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[8] The Court thereafter repeated its view by stating, "Indeed, remedial legislation of a regulatory nature is to be given a liberal construction," citing *Tcherepnin* v. *Knight*, 389 U.S. 332, a case which did not involve a criminal penalty. (App. 11a).

of crime, reinforcing this remark by saying that this section is part of a detailed statutory regulation of the insurance business by the superintendent of insurance.

While the lower court mentions "a detailed statutory regulation," it has failed to study the details. The Insurance Code for the District of Columbia—Chapter 35—is a fabric of three different components. First, there are sections which are plainly regulatory in character, albeit penal, as, for instance, Sections 222 and 515[9]; and there are numerous other sections setting up provisions of substance relating to corporate creation, organization and operation, including the establishment of civil remedies and liabilities, as, for instance, Sec. 526. The third component involves a number of criminal sections, such as Sec. 530, over which the superintendent has no control and for a violation of which, prosecution is the sole remedy and is in the hands of either the Corporation Counsel or the United States Attorney. Where a section is both penal and regulatory, this is spelled out by alternative remedies, such as are found in Sec. 426.[10]

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[9] Sec. 222 provides that in lieu of revoking or suspending a certificate of authority for failure to comply with the rules and regulations promulgated by the Commissioners, the Superintendent may subject the company to a penalty of not more than $500.

Sec. 515 provides that every insurance company which has neglected to keep certain records open for inspection, as therein provided, shall forfeit to the District of Columbia the sum of $50 for every day it shall neglect, at the suit of the Superintendent filed by the Corporation Counsel in the District Court.

[10] Sec. 426, providing for suspension and revocation of a license, prescribes a fine, upon conviction, not to exceed $100 for each and every violation, but alternatively gives the Superintendent of insurance the power to subject such person to a *penalty* of not more than $200 when he finds that the public interest would be best served by the continuation of the license.

It is obvious that the Court of Appeals' remark that Sec. 530 is not found in the criminal code for the District of Columbia has no validity whatsoever. A reference to a number of criminal sections in Chapter 35, in addition to Sec. 530, demonstrates both that the location of the section in the D. C. Code is utterly of no significance, and that in the admixture of the components of the statutory fabric, the criminal sections, similar to Sec. 530, are not remedial nor regulatory but instead are wholly punitive in nature,[11] unless they are of the hybrid variety found in Section 426.

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[11] Sec. 204 makes it a misdemeanor for one connected with an insurance company to violate any of the provisions of that section, which relate to keeping and removing of records, etc.

Sec. 223 makes it a crime (misdemeanor) for any person to violate any provision of that section. The section relates to registration requirements of beneficial owners of stock, etc.

Sec. 408 makes it a *felony* for one connected with an insurance company to make a false statement in an annual report.

Sec. 410, relating to advertisements of alien companies, makes a violation thereof a misdemeanor.

Sec. 411 makes the defamation of insurance companies a misdemeanor.

Sec. 423 provides that a failure of a company to file an instrument appointing the Superintendent as agent for service of process shall, upon complaint filed by the Superintendent in the District Court, be fined, upon conviction, not to exceed $200 a day for such violation.

Sec. 424 makes it unlawful for an insurance company to make a political contribution, a violation of which constitutes a misdemeanor.

Sec. 428, requiring every person engaged in business in the District as a life insurance broker to have a license, makes failure thereof, upon conviction, subject to a fine not exceeding $100 for each and every violation.

Sec. 719 makes it a misdemeanor for any agent, broker, examining physician or other person to make false statements in an application for life insurance.

Sec. 1123 makes it a misdemeanor for any insurance agent or broker to solicit or procure insurance with any corporation not authorized by license to transact such business.

The Superintendent maintains that the status of petitioner Corby creates a violation of law. If this be so, the Superintendent's remedy is not under Section 530. He cannot require Corby to resign or Acacia to sell Corby's mortgage note, although he hints at the latter in his letter of December 16, 1953. (Tr. 13)

The Superintendent's recourse or remedy is plainly under Sec. 405(e), which provides for revocation or suspension of an insurance company's license upon a number of different grounds, the pertinent one being subsection (e), where an insurance company has violated any law of the District.

Thus, we find a criminal section providing for a criminal prosecution in case of its violation, and another section (405(e)) giving the Superintendent an administrative recourse based upon a violation of the criminal section. This is precisely the situation which arose in *Federal Communications Commission* v. *American Broadcasting Company,* (1954), 347 U.S. 284, 98 L. Ed. 699, where the Federal Communications Commission, acting pursuant to its regulatory power under the *Federal Communications Act,* sought to prevent telecasts or broadcasts of alleged games of chance in violation of another section of the Act which was entirely criminal in character.[12] In that case this Court put to rest the proposition that a purely criminal provision in an overall regulatory act should be liberally construed if the question of its construction were raised in the context of a non-criminal proceeding. In recognizing the rule of strict construction, this Court stated:

> "It is true, as contended by the Commission, that these are not criminal cases, but it is a crimi-

[12] This section has been recodified as Sec. 1304 of 18 U.S.C. (the federal criminal code), but this change does not affect its historical relationship to the Federal Communications Act.

nal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give Sec. 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly." (at 347 U.S. 296, 98 L.Ed. 709)

II

THERE IS CONFUSION IN THE LOWER COURTS, BROUGHT ABOUT BY A SEEMING MISAPPLICATION OF THE DECISIONS OF THIS COURT, AS TO WHETHER AN AMBIGUOUS, BUT PURELY CRIMINAL PROVISION IN AN ACT CONTAINING CIVIL, CRIMINAL AND REGULATORY PROVISIONS, IS TO BE LIBERALLY OR NARROWLY CONSTRUED.

There is much confusion, and indeed, in some instances, a sharp division of view among or in some of the Circuits, as to whether an ambiguous, but purely criminal provision, found in a statute containing criminal, civil and regulatory provisions, should be strictly or leniently construed.[13]

Each view relies upon precedential aid from the decisional law enunciated by this Court; but as yet,

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[13] Thus, the position of the District of Columbia Circuit in this case, according liberal construction of a penal provision in an act containing civil, criminal and regulatory provisions, is irreconcilable with the view taken by the Sixth Circuit. Compare *North American Van Lines* v. *United States* (6 Cir. 1957) 243 F.2d 693 (construing narrowly a penal provision in the *Interstate Commerce Act*, and rejecting the liberal construction sought by the Commission).

based on Petitioners' research, this precise issue has not been dispositively ruled upon by this Court.

With the growing number of statutes tinged with the public interest (such as those relating to insurance, consumer protection, lending, housing, etc.) and containing civil, criminal and regulatory provisions, it must be anticipated that uncertainty as to the standard of construction to be applied to the purely criminal provisions contained in an overall regulatory act, will continue to cause increased confusion and division. For, it can be urged, on the one hand, that if the purpose of the statute in its entirety is to protect the public interest, then every provision of the act, including purely criminal sections, must be construed liberally.

Conversely, it is persuasively urged that any ambiguity in a purely criminal provision, regardless of where found, must be strictly, yet reasonably, construed. For, otherwise, the basic tenets of due process and protection of the individual from punishment for conduct not clearly defined would be transgressed.

While it would appear that this latter view is the favored one, the expressions on this subject are not altogether clear.

(a)

The more authoritative rule is that a purely criminal provision in an act containing civil, criminal and regulatory sections, must be narrowly construed.

The more authoritative view, and, indeed, that suggested by the majority of pertinent opinions in this Court, is that an ambiguous, but purely criminal section, regardless of where found, must be strictly construed. Thus, this Court in construing Section 10 of the *Clayton Act* in *United States* v. *Boston & Maine*

R.R. (1965) 380 U.S. 157 at 160, 13 L.Ed.2d 728 at 731, stated:

> " 'The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.' Id., p. 95, 5 L.Ed. 42.
>
> "The fact that a particular activity may be within the same general classification and policy of those covered does not necessarily bring it within the ambit of the criminal prohibition. United States v. Weitzel, 246 U.S. 533, 62 L.Ed. 872, 38 S.Ct. 381."

And, as earlier noted herein, this Court in *Federal Communications Commission* v. *American Broadcasting Company, supra,* emphatically rejected the proposition that a purely criminal provision in an overall regulatory act could be leniently construed if the ambiguity was raised in the context of a civil, rather than in a criminal proceeding.

Again, in *Commissioner of Internal Revenue* v. *Acker* (1959) 361 U.S. 87, 4 L.Ed.2d 127, this Court, in strictly construing an ambiguous portion of the *Internal Revenue Act* calling for the imposition of a 5% penalty for failing to file a declaration of estimated tax, stated:

> "We are here concerned with a taxing act which imposes a penalty. The law is settled that 'penal statutes are to be construed strictly,' Federal Communications Com. v. American Broadcasting Co. 347 U.S. 284, 296, 98 L.Ed. 699, 709, 74 S.Ct. 593,

and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it,' Keppell v. Tiffin Sav. Bank, 197 U.S. 356, 362, 49 L.Ed. 790, 792, 25 S.Ct. 443. See e.g. Tiffany v. National Bank of Missouri (US) 18 Wall 409, 410, 21 L.Ed. 862, 863; Elliott v. Eastern Pennsylvania R. Co. 99 U.S. 573, 576, 25 L.Ed. 292, 293." (at 361 U.S. 91, 4 L.Ed.2d 130-131)

Like teachings are found in *United States* v. *Universal C.I.T. Credit Corporation* (1952) 344 U.S. 218, 97 L.Ed. 260 (construing narrowly a criminal section found in the *Fair Labor Standards Act*); *United States* v. *Laub* (1967) 385 U.S. 475, 17 L.Ed.2d 526 (construing strictly a criminal provision in the *Immigration and Nationality Act*); *United States* v. *Fruit Growers Express Company* (1929) 279 U.S. 363, 73 L.Ed. 739 (construing strictly § 20 of the *Interstate Commerce Act* which subjected an offender to criminal sanctions).

Similar rules of strict statutory construction of an ambiguous penal provision in a regulatory act have been handed down in various Circuits other than the District of Columbia. See, e.g., *United States* v. *Carter et al.* (6 Cir. 1963) 311 F.2d 934 (construing strictly a penal provision in the *Taft Hartley Act*); *North American Van Lines* v. *United States, supra* (narrowly construing a criminal provision in the *Interstate Commerce Act*); *United States* v. *Woody Fashions, Inc.* (D.C.N.Y. 1961) 190 F.Supp. 709 (construing narrowly a penal provision of the *Wool Products Labeling Act*); and *MacDonald* v. *Best* (N.D. Cal. 1960) 186 F.Supp. 217 (construing narrowly a forfeiture provision of the *Mining Claims Rights Restoration Act*).

The critical distinction between the seemingly contradictory expressions by this Court appears to be

this: Where the ambiguity lies in a provision which, within its four corners, is a penal provision, then any ambiguities in such a provision will be strictly construed, regardless of the fact that the provision in question may appear in an overall act regulating a matter in the public interest and containing various civil and remedial sections. See, e.g., *United States* v. *Universal C.I.T. Credit Corporation, supra* and *Federal Communications Commission* v. *American Broadcasting Company, supra.* This, because to do otherwise would unjustly subject an individual to punishment without warning him explicitly of the conduct outlawed. See: *Lanzetta* v. *New Jersey* (1939) 306 U.S. 451, 83 L.Ed. 888; *United States* v. *Cohen Grocery Co.* (1921) 255 U.S. 81, 65 L.Ed. 516.

On the other hand, where only the general provisions of a remedial or regulatory act are questioned, apart from the criminal or penal provisions, then ambiguities in such general sections will be liberally resolved. See, e.g., *Federal Trade Commission* v. *Mandel Bros. Inc.* (1959) 359 U.S. 385, 3 L.Ed. 893; *Tcherepnin* v. *Knight* (1967) 389 U.S. 332, 19 L.Ed.2d 564.

In essence, the Court of Appeals in the case at bar painted with too broad a brush. After finding that the *Life Insurance Act of the District of Columbia* was imbued with the public interest and contained regulatory provisions, it mistakenly applied a rule of liberal construction to *all* of the provisions, including the criminal provision here in question. This, we submit, was in error. The instant decision does, however, point up dramatically the confusion now existent as to the construction to be afforded to wholly penal provisions found in a broader act imbued with the public interest.

(b)

The minority view, adopted by the District of Columbia Circuit, is that an ambiguous but purely criminal provision in a broad statute must be liberally construed if the basic purpose of the broad statute is remedial or regulatory.

An apparent minority view, adopted by the District of Columbia Circuit, is that liberal construction must be afforded to a purely criminal provision if such provision is found in a broad act containing regulatory or remedial features. Thus, in *District of Columbia* v. *Horning* (1918) 47 App. D.C. 413, when construing a criminal provision found in the District's *Pawnbrokers Act,* the Court of Appeals for the District of Columbia announced:

> "The rule of strict statutory construction as applied to criminal statutes is relaxed in interpretation of an act designed to declare and enforce a principle of public policy". (47 App. D.C. at 423)

And, in the instant case the same Court of Appeals declared:

> "* * * in such a dominantly regulatory statute the rule of strict construction of a criminal statute is relaxed." (App. 10a).

A somewhat similar approach to that applied by the District of Columbia was followed by the District Court for the Northern District of Illinois in *United States* v. *Kordel* (D.C. Ill. 1946) 66 F.Supp. 538, aff'd. 164 F.2d 913, aff'd. on other grounds, 335 U.S. 345, 93 L.Ed. 52.

A slightly different rationale was enunciated in *Salonen* v. *Farley* (D.C. Ky. 1949) 82 F.Supp. 25.

There the District Court of Kentucky held that if a statute was both penal and remedial, it was to be construed strictly when it was sought to enforce the penalty, but liberally construed when the remedy was sought to be enforced. A somewhat similar line of reasoning was adopted by the Second Circuit in *Precise Imports Corporation* v. *Kelly* (2 Cir. 1967) 378 F.2d 1014, wherein that Circuit upheld a liberal standard of construction of an ambiguous criminal section if the construction was presented by way of civil proceedings relating to a remedy.

Inferential support for the minority view can be gleaned from language of this Court in *United States* v. *Stowell* (1890) 133 U.S. 1, 33 L.Ed. 555, and *United States* v. *Ryan* (1931) 284 U.S. 167, 76 L.Ed. 224 (both of which held that acts to prevent fraud on the public revenue, while involving forfeitures, must be broadly construed); and *S.E.C.* v. *Joiner Leasing Corp.* (1943) 320 U.S. 344, 88 L.Ed. 88, as well as the broad language found in the numerous cases decided by this Court dealing with legislation purely remedial in character. *See e.g. Tcherepnin* v. *Knight, supra;* and *State Farm Fire and Casualty Co.* v. *Tashire* (1967) 386 U.S. 523, 18 L.Ed.2d 270.

Petitioners submit that this Court's decision in cases such as *Federal Communications Commission* v. *American Broadcasting Company,* and *Commissioner of Internal Revenue* v. *Acker, supra,* are so clear and unequivocal that their application to the instant case is virtually irresistible. The former decision was cited in Petitioners' brief in the Court of Appeals, but was not mentioned in the opinion here complained of.

III

POSSIBLE CONSEQUENCES OF THE COURT OF APPEALS DECISION; AND A RETROSPECTIVE ANALYSIS

The possibilities of the decision below are striking. Section 530, fraught with ambiguities, has now been construed by the highest court in the District of Columbia to make Petitioner Corby's election to the Acacia Board of Directors a misdemeanor, punishable by a fine of $500. Should the Corporation Counsel, who is Respondent's lawyer, now file an information against Petitioner Corby, he would have no choice but to plead guilty.

Suppose, instead, that Respondent had sought prosecution of Corby before this declaratory judgment proceeding was instituted. The trial judge, in a purely criminal setting, would likely have given a strict construction to the section, and this undoubtedly would have followed the reasoning of the district judge in the case at bar, resulting in an acquittal. Or, if the trial judge in such an assumed prosecution had applied a liberal interpretation and convicted Corby, the appellate courts of the District of Columbia would have found it necessary to come to grips with the strict construction requirement of the cases and, again, in a purely criminal context, the conviction would doubtless have been reversed.

The foregoing reasoning illustrates the vice that this Court saw in *American Broadcasting Company, supra.* There cannot be one rule of construction for a criminal prosecution and another for an administrative proceeding. Due process requires a clear and unambiguous criminal statute; and since a statute should have

only one construction, the strict rule should prevail over the liberal.

CONCLUSION

A writ of certiorari should issue in this instance.

Respectfully submitted,

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April, 1969

APPENDIX

APPENDIX

[Filed May 10, 1968]

Oral Opinion of the United States District Court by Alexander Holtzoff, Judge

The Court: The question presented in this case is whether a person who has borrowed money from a District of Columbia insurance company is eligible to become a member of the board of directors or an officer of the insurance company while the loan is outstanding. The question depends upon a construction of one of the provisions of the Code of the District of Columbia relating to insurance companies.

The facts out of which this question arises are few and undisputed. On April 12th, 1962 plaintiff Acacia Mutual Life Insurance Company made a loan of $288,000, secured by a mortgage, on an office building in the District of Columbia, to a number of persons, including the plaintiff Karl W. Corby. The loan was for 21 years.

On March 21st, 1967, five years later, while the loan was still outstanding but in current condition, the plaintiff Corby was elected a member of the board of directors of Acacia.

The question is whether he is eligible to that office.

The Superintendent of Insurance of the District of Columbia has indicated that in his opinion plaintiff Corby is not eligible to fill the office of director in the light of the foregoing circumstances and has indicated that he would consider withdrawing necessary annual certificates from Acacia if the situation continues.

Acacia takes the position that the statutory prohibition bars a director or an officer from borrowing money from his insurance company but does not relate or include situations where a person who has borrowed money from the

insurance company later becomes a director or an officer while the loan is still outstanding.

This action was brought by the two plaintiffs against the Superintendent of Insurance for a declaratory judgment and is before the Court at this time on cross motions for summary judgment.

The Corporation Counsel, who represents the defendant, with commendable candor concedes that there is a justiciable controversy in view of the possible sanctions that may be applied to the insurance company and the serious consequences that may result from them.

The answer to the question or the solution of the problem here presented depends upon a construction of the applicable statute, which is found in District of Columbia Code, Title 35, Section 530. It reads as follows:

> "No director or officer of any company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending, or aiding in any purchase by or sale to such company of any property, or any loan from such company, nor be pecuniarily interested, either as principal, coprincipal, agent, or beneficiary, in any such purchase, sale, or loan, nor shall the financial obligation of any such director or officer be guaranteed by such company in any capacity: Provided, That nothing herein contained shall prevent any such director or officer from receiving a fee for appraising property for said company or for serving on any committee that passes on the investments of said company: Provided further, That nothing herein contained shall prevent a life insurance company from making a loan upon a policy held therein by a director not in excess of the net value thereof. Any person violating any provisions of this section shall be guilty of a misdemeanor."

It is natural for the Superintendent of Insurance, who is an efficient, enlightened and dedicated public servant, to

adopt such a construction of the statute as in his opinion would best effectuate its purposes and best protect the interests of the insurance company, its policyholders and the community. He is to be commended for this attitude. The Court, however, must construe the statute.

At the outset it must be emphasized that a criminal penalty is attached to the statute and, therefore, it must be treated as a penal statute.

It is fundamental that penal statutes must be strictly construed. This rule does not mean that the narrowest and strictest possible interpretation must be put on a penal statute that might completely defeat the purpose of Congress and devitalize the provisions. It does mean, however, that while the courts should put a reasonable construction on a penal statute, nevertheless it should not be broadly or liberally construed but should be interpreted in a narrow and strict manner because of the criminal penalty that may be imposed for its violation.

An entirely different problem might have been presented here if the statute was a purely regulatory measure and contained no sanctions but those of a civil nature and perhaps vested in the Superintendent the authority and power to promulgate regulations that would interpret the Act. This is not such a case.

Bearing in mind the principle to which reference has just been made, that penal statutes must be strictly construed, it is necessary to proceed to analyze the Act.

There are two separate aspects to this statutory provision. The first is to the effect that no director or officer of any company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending or aiding in any purchase by, or sale to, such company of any property or any loan from such company. The other provision is that he shall not be pecuniarily interested, either as principal, co-principal, agent or

beneficiary, in any such purchase, sale or loan. It is well to consider these two parts of the statute separately.

The first part of the statute is itself susceptible to more than one construction. One way to read that clause is as follows:

> "No director or officer of any company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending or aiding in . . . any loan from such company."

The meaning of the provision, if so read, is that a director or officer may not receive any compensation or fee or commission for procuring a loan to be made.

There is another way of reading that provision and it is as follows:

> "No director or officer of any company doing business in the District shall receive . . . any loan from such company."

The first of these two constructions would adopt too narrow a view because it is quite apparent that Congress intended to reach at least two results. One was to bar a director or officer from receiving any compensation, such as broker's commissions, for procuring a loan to be made. The other was—and perhaps a more important one—to prevent a director or officer of an insurance company from borrowing any money from the insurance company while he was a director or officer.

The second part of the statute bans a director or officer of any insurance company from being "pecuniarily interested, either as principal, co-principal, agent or beneficiary, in any such purchase, sale or loan." This clause is clearly ambiguous and indefinite. What is meant by being pecuniarily interested in a loan either as principal, co-principal, agent or beneficiary? Does it mean and does it relate to

the transaction of lending money, or does it have a broader scope and apply to the status of a loan so as to be applicable during the entire period that the loan is in existence?

Bearing in mind that, as stated heretofore, penal statutes should be narrowly construed, the Court is of the opinion that the first of these two constructions should be adopted.

In addition to the requirement of narrow construction of penal statutes we must apply another principle, that ambiguities in a penal statute should be resolved in favor of a person who is affected by it, in view of the basic doctrine that a criminal penalty shall not be imposed on anyone for some violation that is not clearly accentuated in the statute.

In the light of these considerations the Court construes this statute, insofar as the question involved in this case is concerned, as containing two prohibitions. One is that no director or officer of any company doing business in the District of Columbia shall receive any compensation, such as broker's commission or fee, for negotiating or procuring a loan from the company with which he is so connected; second, that no director or officer may receive any loan from the company of which he is such a director or officer. It does not bar a person who had previously received a loan from the company from later on becoming a director or officer, even though the loan is still outstanding.

The conclusion necessarily follows that the plaintiff Corby was eligible to be elected to the Board of Directors of Acacia and is eligible to continue as such.

The plaintiffs' motion for summary judgment is granted and the defendant's cross-motion is denied.

Counsel may submit a proposed order in accordance with this ruling.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,139

ALBERT F. JORDAN, *Appellant*

v.

ACACIA MUTUAL LIFE INSURANCE CO.,
KARL W. CORBY, *Appellees*

Appeal from the United States District Court
for the District of Columbia

Decided February 20, 1969

* * * * * * * * * *

Before FAHY, *Senior Circuit Judge*, LEVENTHAL and ROBINSON, *Circuit Judges*.

FAHY, *Senior Circuit Judge:* It is provided in 35 D.C. Code § 530 (1967), set forth in the margin,[1] that no director

[1] **§ 35-530. Officers and directors not to be pecuniarily interested in transactions—Appraisement—Loans on policies.**

No director or officer of any company doing business in the District shall receive any money or valuable thing for negotiating, procuring, recommending, or aiding in any purchase by or sale to such company of any property, or any loan from such company, nor be pecuniarily interested, either as principal, co-principal, agent, or beneficiary, in any such purchase, sale, or loan, nor shall the financial obligation of any such director or officer be guaranteed by such company in any capacity: *Provided*, That nothing herein contained shall prevent any such director or officer from receiving a fee for appraising property for said company or for serving on any committee that passes on the investments of said company: *Provided further*, That nothing herein contained shall prevent a life insurance company from making a loan upon a policy held therein by a director not in excess of the net value thereof. Any person violating any provision of this section shall be guilty of a misdemeanor. (June 19, 1934, 48 Stat. 1151, ch. 672, Ch. III, § 30.)

35 D.C. Code § 530.

or officer of any insurance company doing business in the District shall receive any money or valuable thing for negotiating any loan from the company or be pecuniarily interested in any such loan. The one exception[2] is that a life insurance company may make a loan to a director upon a policy he holds in the company, in an amount not in excess of the net value of the policy.

In 1962 appellee Acacia, a life insurance company doing business in the District, made a loan of $288,000 to appellee Karl W. Corby and others, secured by mortgage. In March, 1967, while the greater part of this loan was undue and outstanding Mr. Corby was elected to Acacia's Board of Directors, in which position he remains while the loan is still undue and unpaid in substantial part. He became a director notwithstanding in 1953 Acacia had requested and received from appellant Jordan, Superintendent of Insurance of the District of Columbia, his opinion that Section 530 prohibited one from becoming a director who was thus indebted to the company. After Mr. Corby had become a director, Acacia in June, 1967, through its President, again requested the Superintendent's opinion. The Superintendent responded:

> . . . I am unable to concur in the opinion expressed in your letter of June 26 [1967] that a domestic company may hold a mortgage on the property of one of its directors, provided the loan was made prior to his becoming a director. In my opinion the law does not permit a director to have such a pecuniary interest at any time. . . .
>
> It is my view that the statute was intended to guard against conflicts of interest so that the company's

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[2] The first proviso of Section 530, note 1, *supra*, assures that an insurance company will not be deprived, by the terms of the section, of normal services of its officers and directors with respect to the investments of the company.

financial decisions would invariably be made at arm's length. . . . It seems to me that a life insurance company serves its policyholders in a fiduciary capacity, and I simply do not believe that a debtor-creditor relationship should exist between the fiduciary company and those who control it.

Of course, no one expects that an awkward situation would arise in the particular case to which you refer, but I think that the law clearly contemplates that a life insurance company will be careful to avoid a relationship which is inherently improper. . . .

Discussions which followed, participated in by a representative of the Corporation Counsel, brought no change in the Superintendent's position, in which he was later supported by a formal opinion of the Corporation Counsel.

Thereafter appellees filed a complaint against the Superintendent for a declaratory judgment and injunctive relief. On the basis of the pleadings which ensued, accompanied by affidavits, it became clear, aside from the possibility of appellee Corby becoming involved in a criminal prosecution under the statute, note 1, *supra*, that the right of Acacia to continue doing business in the District and of Mr. Corby to remain a director were brought into question. A justiciable controversy was thus presented for resolution by the District Court, and since no genuine issue of material fact appeared the motions of the parties, respectively, for summary judgment, brought the case to a posture for decision. The District Court,[3] accompanying its action with an opinion orally delivered, granted the motion of appellees and denied that of appellant. The court relied heavily upon the rule that a criminal statute is to be strictly construed and, so construing Section 530, held that it did not bar a person who was interested as principal in a loan from an insur-

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[3] *Acacia Mutual Life Insurance Co.* v. *Jordan*, 283 F.Supp. 766 (D.D.C.).

ance company from becoming a director of the company when his interest in the loan arose prior to his becoming a director. This basis for decision is also a principal reliance of appellees. On the Superintendent's appeal we take a different view and reverse.

The purpose of Section 530 is more regulatory than criminal in nature. The section appears in our Code under Title 35.—Insurance. It is part of a detailed statutory regulation of that business by a Department of Insurance headed by the Superintendent of Insurance, a statutory officer. Section 530 is not part of our Code devoted to the definition and punishment of crime. The regulatory tenor of the provision is indicated also by its title: "**Officers and directors are not to be pecuniarily interested in transactions. . . .**" (*Supra,* note 1.) See *F.T.C.* v. *Mandel Bros., Inc.,* 359 U.S. 385, 388-89. The purpose is to prohibit one who is a director from becoming pecuniarily interested in a loan from the company and, equally, to disqualify one who is pecuniarily interested in such a loan from becoming a director. The section is very detailed in its prohibitions of a director's involvement with his company in a way which might conflict with his personal interest. The dominant purpose is not to punish one who violates the statute, but to secure the fiduciary relationship from being utilized in a manner which might give rise to such a conflict. It is to maintain the company's affairs in conformity with the policy expressed. The addition of the misdemeanor sanction is incidental to this.

The construction contended for by appellees would permit a director to be pecuniarily interested in a loan if it were made by the company before he became a director. This construction is arrived at by considering that the language prohibiting such an interest in "any such . . . loan" as a matter of syntax is limited by the word "such" to a loan referred to in the preceding language of the section, which is then construed to bar one from having a financial

interest in a loan made by the company after he has become a director. But, as we have pointed out, it is more consonant with the full content and purpose of the section to interpret "any such . . . loan" in which a director may not have a pecuniary interest to mean any loan by the company to him, with the exception noted of a loan on a life insurance policy. The word "such" is thus interpreted as referring not merely to a loan negotiated at a particular period of a director's relationship to the company but to the character of the transaction previously referred to in the section, that is, a loan. Resort to a rule of strict construction to accomplish the more limited scope of the language is inappropriate; for in such a dominantly regulatory statute the rule of strict construction of a criminal statute is relaxed:

> The rule of strict construction as applied to criminal statutes is relaxed in the interpretation of an act designed to declare and enforce a principle of public policy.

District of Columbia v. *Horning,* 47 App.D.C. 413, 423.[4]

> [I]t settled that "though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature." *United States* v. *Lacher,* 134 U.S. 624. In that case we cited and quoted from *United States* v. *Winn,* 3 Sumn. 209, in which Mr. Justice Story, referring to the rule that penal statutes are to be construed strictly, said:
>
> "...In short, it appears to me, that the proper course in all these cases, is to search out and follow the true

[4] Appellees point to the difference in the factual situation between *Horning* and this case. The statement in the opinion upon which we rely, however, is clearly applicable and we think it is sound.

> intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature."

Johnson v. *Southern Pacific Co.*, 196 U.S. 1, 17-18.

Indeed, remedial legislation of a regulatory nature is to be given a liberal construction. *Tcherepnin* v. *Knight*, 389 U.S. 332, 336. And, correspondingly, exceptions to a remedial statute must be narrowly construed. *Piedmont & N. R. Co.* v. *I.C.C.*, 286 U.S. 299, 311-12; *Port of New York Authority* v. *Baker, Watts & Co.*, —— U.S.App.D.C. ——, 392 F. 2d 497.

Because of his continued interest in the loan to which we have referred Mr. Corby was not qualified to become a director of Acacia. We so hold not only because of our independent construction of Section 530, but also because this accords with its interpretation by the Superintendent of Insurance, who has primary responsibility for administering the relevant Code provisions. *S.E.C.* v. *National Securities, Inc.*,——U.S.——. The Superintendent "shall have supervision of all matters pertaining to insurance, insurance companies, and beneficial orders and associations, subject only to the general supervision of the commissioners." 35 D.C. Code § 101. The Superintendent's sensitivity to the intended thrust of Section 530, expressed to Acacia in 1953, and repeated in 1967, is entitled to weight at our hands. *Udall* v. *Tallman*, 380 U.S. 1, 16; *Philadelphia Television Broadcasting Co.* v. *F.C.C.*, 123 U.S.App.D.C. 298, 359 F. 2d 282. His interpretation is reasonable, best comports with the purpose of the section as a whole, and is not inconsistent with its language.[5] The courts, in giving a fair reading to that language, with the aid of the applicable

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[5] Compare *Hutchins Mut. Ins. Co. of District of Columbia* v. *Hazen*, 70 App.D.C. 174, 105 F.2d 53 (1939), and *Drake* v. *United States ex rel. Bates*, 30 App.D.C. 312 (1908).

rules of statutory construction, we think should not depart from that adopted by the Superintendent.[6] *S.E.C.* v. *National Securities; Udall* v. *Tallman; Philadelphia Television Broadcasting Co.* v. *F.C.C.*, all *supra*.

Reversed and remanded for further proceedings not inconsistent with this opinion.

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[6] We are advised of the regulation of the Board of Governors of the Federal Reserve System interpreting Section 22(g) of the Federal Reserve Act, 12 U.S.C. § 375a, as amended July 3, 1967. The statute provides:

> (1) Except as authorized under this section, no member bank may extend credit in any manner to any of its own executive officers. No executive officer of any member bank may become indebted to that member bank except by means of an extension of credit which the bank is authorized to make under this section. • • •

Under its authority to make regulations to effectuate the purposes and prevent evasions of this section the Board of Governors of the System has provided that the prohibitions of Section 22(g) refer to an executive officer of a member bank who is an executive officer thereof at the time he borrows from or otherwise becomes indebted to the bank, and that accordingly a loan made in good faith to one not then such officer and when the loan is not made in contemplation of his becoming an officer does not disqualify such person from thereafter becoming an officer notwithstanding the indebtedness is outstanding. We note the difference between the scope of the language of Section 530 of our Code and that of Section 22(g) of the Federal Reserve Act. Otherwise we need only comment that we are not called upon to pass upon the validity of the Board's regulation.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1968.

Civil 266-68

No. 22,139

ALBERT F. JORDAN, *Appellant,*

v.

ACACIA MUTUAL LIFE INSURANCE CO., KARL W. CORBY, *Appellees.*

Appeal from the United States District Court for the District of Columbia.

Before: FAHY, Senior Circuit Judge; LEVENTHAL and ROBINSON, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed, and this case is remanded to the District Court for further proceedings not inconsistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

NATHAN J. PAULSON
Clerk

Dated: February 20, 1969.
Opinion by Senior Circuit Judge Fahy.